

2002

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Recommended Citation

Purcell, Edward A. Jr., "The New Deal "Constitutional Revolution" as an Historical Problem, Book Review of G. Edward White's *The Constitution and the New Deal*" (2002). *Other Publications*. 387.

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THE NEW DEAL 'CONSTITUTIONAL REVOLUTION' AS AN HISTORICAL PROBLEM

BY EDWARD A. PURCELL JR.

The past quarter century has witnessed a major shift in the structures of American politics, often characterized as the passing of "the New Deal order." G. Edward White's superb new book *The Constitution and the New Deal* is a monument to that sea change, a clear-eyed effort to assess the significance of the New Deal and its iconic "constitutional revolution" from a self-consciously removed perspective that regards the New Deal as truly "past" and its well-established historiography as largely apologetic. Most prior accounts of the New Deal and its "constitutional revolution," White tells us, are "triumphalist narratives" that have had a "powerful and distorting historiographical effect."

White's clearly written and cogently reasoned book is a pleasure to read, but its ambition and complexity make it a challenge to review. Although on one level it has a quite narrow focus, the book nevertheless involves many issues and carries a variety of implications, not all of which White spells out or explores in detail.

Its narrowness comes from the way it conceives its ostensible subject. *The Constitution and the New Deal* does not inquire into the complex, shifting, and interactive relationship that existed between its two titled elements. Rather, it focuses instead on a single well-known question: did the election of 1936 and, especially, the "Court-packing" plan that President Franklin Roosevelt announced the following February "cause" the Supreme Court to change its interpretations of the Constitution in the spring of 1937?

The book's breadth and ambition, in contrast, come from the fact that its true subject is not the Constitution and the New Deal as such

but rather the evolution of American jurisprudence, the nature of constitutional law, and the power of preconceptions to distort legal and historical analysis. In exploring these themes the book operates on at least six intertwined levels. It is a history of numerous constitutional changes that occurred during the first half of the 20th century; a study of the relationship between those changes and the New Deal "constitutional revolution"; an intellectual history of "the conventional account" of that relationship as it evolved over the remainder of the 20th century; a broad reinterpretation of that relationship which "minimizes the significance of the New Deal" while stressing the central importance of "modernity"; a largely implicit critique of recent work in "normative" constitutional history for abusing the past to serve contemporary political purposes; and a general argument about the causal role of the law's "internal" categories and doctrines as opposed to the "external" pressures that society places on law.

II

The "conventional account," White explains, contends that the New Deal inaugurated a "new era of constitutional law and constitutional interpretation." This "new era" involved a substantial expansion of governmental power, especially at the national level, and a new kind of "bifurcated" judicial review that called for "deferential" scrutiny of government economic regulations and "aggressive" scrutiny of government actions impinging upon civil rights and liberties. In addition, it embraced a new "modernist" jurisprudence that conceived of Supreme Court justices "not as apolitical savants discerning the essentialist principles of the Constitution but as political actors with their own ideological agendas."

Challenging that "conventional account," the book pivots on its reexamination of a narrowly defined "causal" issue. "At the core of the conventional narrative," it declares, "is a group of events, taking place within a relatively short time span, which have been invested with causal prominence and whose ramifications have been assumed to extend backward and forward over a considerable range of time." As the account runs, between 1934 and 1936 the Supreme Court's opposition to the New Deal's program of national economic regula-

tion created a titanic confrontation, but the election of 1936 and Roosevelt's Court-packing plan ultimately pressured the justices to abandon their prior views and remold the Constitution to accommodate the New Deal.

White adopts two strategies to disprove that causal connection. First, in four successive chapters he examines early 20th-century developments in the law of foreign relations, administrative agencies, and free speech. Those constitutional areas "lie somewhere on the periphery of the conventional narrative's focus," White acknowledges, but he begins with them because the "most ambitious versions" of the "conventional account" have "tended to posit a constitutional revolution that swept through all areas of constitutional law in the wake of the New Deal and the Court-packing crisis." The chapters on the law of foreign relations and administrative agencies, in particular, provide fresh and insightful analyses of major jurisprudential areas that have too often been ignored or treated with little historical sophistication. Together, the chapters demonstrate convincingly that major changes were well underway in all three areas before the arrival of the New Deal and certainly before the election of 1936. Further, they show that most of the doctrinal changes in the three areas were not finalized during the years from 1937 to 1943 but rather continued to take shape through the late 1940's and beyond. Hence, the New Deal neither "caused" most of the basic doctrinal changes nor cast the law into any final "New Deal" form.

White's second strategy of critique is confession and avoidance, and he uses it to address those issues "at the very center of the conventional account." He readily admits that the Court made "revolutionary" changes in constitutional "political economy" doctrines. "[O]nly an eccentric student of Contract, Commerce, and Due Process Clause decisions between 1933 and 1943," he writes, "would deny that the Court significantly altered its doctrinal posture in those areas." What White seeks to avoid is the claim that those changes were "caused" by political pressures created by the New Deal.

White summarizes the evidence against the election and Court-packing thesis in the political economy cases and quickly terms it "discredited." Drawing on the illuminating work of Barry Cushman, Richard Friedman, and others, he points, for example, to the fact that

two of the Court's most innovative decisions—*Nebbia v. New York* and *Home Building & Loan Association v. Blaisdell*—came down in 1934, that the Court reached its critical 1937 decision in *West Coast Hotel v. Parrish* before Roosevelt announced the Court-packing plan, and that the Court did not make its most sweeping changes until the early 1940's, long after Court-packing had been abandoned and at a time when "the composition of the Court bore almost no resemblance to its composition in the 1936 Term."

White then offers an alternate explanation for the Court's admitted doctrinal changes. Drawing heavily on Cushman's work, he maintains that the Court's decisions in 1937 and afterward were the result of a "gradual disintegration, in place since the 1920s, of the integrity of the orthodox judicial doctrines and formulas." Indeed, for Cushman and White, it was the Court's 1934 decision in *Nebbia* that was truly "pivotal." *Nebbia* marked the "unravelling" of established due process doctrine and logically paved the way for the drastic changes that followed in the "political economy" cases.

Structurally, White's "doctrinal disintegration" thesis concerning the "political economy" cases parallels his initial argument based on the three "peripheral" constitutional areas of foreign relations, administrative law, and free speech. Both lines of argument coincide to show that pathbreaking changes which subsequently became associated with the New Deal were, in fact, well underway long before 1932.

To understand the significance of White's book, it is important to recognize the way that it minimizes two other theses about the relationship between the New Deal and the "constitutional revolution." One stresses the profound crisis created by the Great Depression and the popular and unprecedented efforts of the New Deal to respond. This thesis suggests that those compelling circumstances may well have influenced one or more of the justices who inaugurated the "constitutional revolution" in 1937—most likely Chief Justice Charles Evans Hughes and especially Justice Owen J. Roberts—and nudged them toward doctrinal interpretations that would approve the new governmental activism. While White would likely acknowledge those conditions as contributing factors, he would insist on their subsidiary significance. If the doctrinal basis of the "consti-

tutional revolution" lay in the "disintegration" of established doctrine that had been "in place since the 1920s," the causal significance of the Great Depression as well as the New Deal must wither.

A second thesis, also implicitly minimized, stresses the fact that Roosevelt reconstituted the Court with seven new appointments between the summer of 1937 and 1943. White readily acknowledges the doctrinal impact of the Roosevelt appointees, but he marginalizes their significance with respect to the "causal" question on two grounds. First, he restricts the question to a narrow time frame: did the New Deal pressure the "old" Court—that is, the Court prior to the ascension of any of Roosevelt's appointees—to repudiate any of its own doctrines? Given that definition of the question, the role of Roosevelt's appointees and of the Court's decisions after the summer of 1937 is simply irrelevant. Second, White portrays the subsequent decisions of the Roosevelt appointees as essentially extensions or corollaries that followed from the "disintegration" of established doctrine. Because those pre-existing doctrinal developments prepared the way for the "constitutional revolution," the Roosevelt appointees, with "less of an investment" in orthodox jurisprudence, were "relatively free to fashion a new set of doctrinal approaches."

White's overall "causal" thesis, then, consists of two principal propositions with room for two subsidiary refinements. The principal propositions are that the "constitutional revolution" was not caused by the election of 1936 or the Court-packing plan and that it was caused, at least primarily, by an interrelated series of doctrinal developments that were well underway before the coming of either the Great Depression or the New Deal. The first refinement is that broader social pressures might have influenced one or more of the justices but that, if they did, the influence was quite limited: limited because any such influence was the result of general circumstances, not politics (that is, any such influence arose from the general need to deal with the Depression and had its effect by the time of *Nebbia* in 1934, before any overt political threats had been made); and limited because any such influence could have affected the Court only because the prior doctrinal "disintegration" had opened logical pathways through which the Court could reach "lawful" new accom-

modations. The second refinement is simpler. The Roosevelt appointees extended, but did not "cause," the "constitutional revolution."

Thus the fundamental importance of White's book—and the point of its tightly constrained definition of the "causal" issue—is that it offers a sophisticated historical explanation of the "constitutional revolution" while affirming the institutional integrity of the Supreme Court and the reality of the rule of law. On the one hand, the book accepts four historical propositions that challenge normative theories of constitutional law: that doctrine evolves continuously, if unevenly; that judges adapt legal doctrines to changing social circumstances; that judicial decisions reflect the personal values of the judges; and that changes in judicial personnel often change the law. On the other hand, the book also affirms two cornerstone propositions that support the ideal of constitutional government and the rule of law. One of those propositions is jurisprudential: that, regardless of the values of individual judges and the reality of doctrinal change over time, established legal principles, categories, and doctrines do, in fact, limit and channel judicial behavior. The other proposition is institutional: that in the 1930's, even though subject to intense pressures, neither the Supreme Court nor any of its justices—officials "whose very identity is bound up in canons of impartiality and fidelity to the authority of law in America"—succumbed to any type of overt political threat or betrayed their own established constitutional principles.

The Constitution and the New Deal is thus sophisticated history that seeks to affirm profoundly important jurisprudential and institutional messages. It was, of course, written before the appearance of *Bush v. Gore*.

III

White's resolution of the "causal" issue sets the stage for two follow-up questions. One is why—if the Court's decisions in 1937 were merely extensions of prior doctrine—contemporaries nonetheless perceived a "constitutional revolution." The other is why—in the face of overwhelming contradictory evidence—the "conventional account" became, and remained, so widely accepted. White's inter-related answers are clear and sweeping.

His answer to the first question is that contemporaries reacted as they did because there was, indeed, a “constitutional revolution.” What they experienced, however, was not a doctrinal revolution “caused” by the New Deal but rather a much broader transformation in constitutional and judicial theory. In the late 1930’s and early 1940’s, White argues, the Court rejected “three core elements of orthodox late nineteenth- and early twentieth-century constitutional jurisprudence.” The first was “an essentialist conception of constitutional principles” that were considered rooted in the text of the Constitution. The second was “a theory of constitutional adaptivity” that understood judicial decisions—no matter how novel—as merely reaffirmations of the “essentialist meaning of constitutional principles.” The third was what White calls “guardian review,” the faith that in construing the Constitution judges merely marked out “preordained boundaries between public power and private rights and between the nation and the states.”

In place of those orthodoxies the post-1937 Court substituted “modernist theories of legal authority and judicial interpretation.” Modernism rejected “essentialist ideas” of pre-existing principles and boundaries, embraced a theory of constitutional adaptivity that assumed a “living Constitution” whose meaning changed over time, and replaced “guardian review” with “bifurcated review,” a more overtly subjectivist practice of judging economic regulations deferentially while protecting civil rights and liberties aggressively. “The result was a constitutional revolution,” White declares, “one in which Supreme Court justices themselves had concluded that there was no intelligible distinction between the authority of legal sources and that of their designated interpreters.” It “was, fundamentally, an interpretative revolution, a revolution stemming from an altered juristic consciousness.”

White’s answer to the second follow-up question flows from his answer to the first. In spite of contradictory evidence, the “conventional account” commanded allegiance because it symbolized the triumph—and authenticated the validity—of the modernism that brought about the true “constitutional revolution.” The “triumph of modernist theories of the nature of law” altered the behavior of the Supreme Court itself and shaped the views of subsequent genera-

tions of commentators. The inheritors of this triumphant modernism consequently embraced the "conventional account" because they cherished both the New Deal and the Court-packing plan as "vivid modernist symbols." The former symbolized "the formative period of modernist governance in America" and affirmed the modernist faith in the capacity of human beings to control their own destiny "through creative uses of government." The latter illustrated the human, pragmatic, and non-essentialist nature of judging. It served as "a symbolic affirmation of the [modernist] proposition that judges, in their role as constitutional interpreters, made law in the legislative sense."

Thus, White's answer to the second follow-up question is straightforward. The "conventional account" cast its spell because later generations believed that the New Deal *must* have been able to control events and that the justices *must* have responded to political pressures. Their modernist assumptions demanded it.

IV

This truncated summary fails to do justice to the subtlety and complexity of *The Constitution and the New Deal*. It does, however, suggest the book's basic themes as well as its historical and intellectual breadth. White succeeds admirably in his goal of "complicating" our ideas about the "constitutional revolution" and historicizing our understanding of its "conventional account." The book's aggressively revisionist nature will surely provoke scholars to reconsider a wide range of issues in 20th-century constitutional history. To start the ball rolling, three comments seem useful.

A.

One of the most striking characteristics of *The Constitution and the New Deal* is its inattention to "politics" of any kind, whether on the level of ideology and values, public policy proposals, elections and voting blocs, social and economic conflicts, or partisan tactical maneuvering. This absence is particularly surprising coming from a historian as sophisticated as White, who over the years has shown an acute awareness of the ways in which political, cultural, and personal

factors interact with legal issues. This is especially surprising, too, because White readily acknowledges that the *true* “constitutional revolution”—the rise and triumph of modernist consciousness—was not a matter of formal doctrinal change but a consequence of complex social dynamics.

The absence of politics, however, means that the book leaves out an element essential to any understanding of the “constitutional revolution” as an historical phenomenon. Regardless of doctrinal logic and conceptual categories, liberals and conservatives alike heralded a “constitutional revolution” because the Court’s decisions in 1937 were widely perceived as the culmination of a long, intense, and well-understood political struggle. For more than half a century Populists, progressives, and New Dealers had criticized the Supreme Court—and the entire federal judiciary—as the protector of wealth and property. The doctrines that White mentions, and many others that he does not, spurred repeated protests and shaped a vibrant political tradition that attacked the Court on a wide variety of grounds ranging from intellectual rigidity to raw social partisanship. Political conservatives and corporate lawyers contributed to the tradition by vigorously defending the Court’s absolute institutional purity and insisting that its decisions were based on unchanging principles of justice and law.

That pervasive political conflict appeared among the justices themselves, not only in their judicial dissents but in their private thoughts as well. In 1936, for example, the three “progressives” took deep satisfaction from the widespread public criticism that erupted after the Court’s 5 to 4 decision invalidating a minimum wage law in *Morehead v. New York ex rel. Tipaldo*. Justice Harlan F. Stone gloated to Justice Benjamin N. Cardozo that “there are some doses too nauseous for even a hidebound conservative to swallow.” Cardozo replied in kind. “I think we should be more than human if we failed to sit back in our chairs with a broad grin upon our faces.” To Justice Louis D. Brandeis, Stone declared that the attacks were particularly satisfying given “the source from which they come.” Even the staunchest conservatives were beginning to recognize “that after all there may be something in the protest of the so-called liberal minority.” The criticism of *Tipaldo* was so vigorous, Stone informed

Cardozo a few weeks later, that "our brethren" in the majority were attempting to avoid responsibility by blaming their decision on a technical flaw in the appeal papers. Their purported excuse, Stone wrote scornfully, was "a flimsy evasion." During the mid 1930's, in fact, the three "progressives" caucused regularly in preparation for the Court's Saturday conferences. The Court's conservative justices, the "Four Horsemen," did the same. Not surprisingly, there seems to be no record of any member of either of the two groups being invited to the other's caucus.

In the spring of 1937 both the standing political lines and the significance of the cases on the Court's docket were clear. Understandably, then, when the Court announced its decisions, it seemed to most observers—New Dealers and their adversaries alike—that the Court had "changed" and that the New Deal had "won." In context, it is not at all puzzling why legal commentators would think that something akin to a "constitutional revolution" had taken place, nor why New Dealers would happily proclaim it as such. Indeed, from the very beginning the label had more than a little of the polemical and rhetorical about it.

Thus, the "constitutional revolution" cannot be reduced to, or fully understood, as either a change in formally stated doctrines or as a transformation in dominant legal "consciousness." Both of those changes were important, but the New Deal "constitutional revolution" was also a complex political transformation that included a variety of critical elements. One was a major realignment in the nation's political structure. A second was a substantial alteration in the roles and interrelationships of the various branches of government. A third was a fundamental change in the Court's animating social and political values. The Court that refused to review hostile interpretations of the Norris-LaGuardia Anti-Injunction Act in the lower courts between 1932 and 1937, for example, was a Court inspired by different substantive values than the Court that enforced that statute readily and vigorously in 1938.

Indeed, a change in the Court's substantive values was apparent in *West Coast Hotel*—the decision that White fairly terms "the very centerpiece" of the "conventional account." In a perceptive analysis White shows that Hughes's majority opinion, in spite of overruling

Adkins v. Children's Hospital, stayed within the formal boundaries of traditional "guardian review." What he passes over, however, is the fact that the Chief Justice's opinion also contained a truly radical change of view. Freedom of contract in the labor market, Hughes wrote, provided "what is in effect a subsidy for unconscionable employers." *West Coast Hotel* may have followed the form of "guardian review," in other words, but it also reflected social and political values that would fundamentally reshape the practical significance of that form.

By ignoring political context the book also overinflates the causal role of "modernist theory." While changing jurisprudential ideas were an integral part of the "constitutional revolution," those ideas did not determine events and perceptions in a vacuum. Indeed, jurisprudential "modernism" arose in part from, and developed in close connection with, the tradition of political protest that indicted the Court for intellectual rigidity and political bias.

Furthermore, the generations that subsequently perpetuated the New Deal's "triumphalist" narrative were surely responding to the interpretative needs of their own later political commitments as much or more than they were compelled by their modernist assumptions. Imagine the situation where scholars discovered significant evidence of a constitutional "original intent" that supported a right to abortion or affirmative action. Would it require a cynic to predict a massive passing of theoretical ships in the night between right and left?

B.

In an illuminating discussion of Senator and then Justice George Sutherland, White highlights a perplexing issue—the role of individual values in judicial decisionmaking. As early as 1909, White tells us, Sutherland as a senator set out "to revise the cast of orthodoxy" in constitutional foreign relations law, and his ideas proved to be "a singularly influential force in the transformation of" the field. Although strictly orthodox in domestic constitutional law, Sutherland "supported aggressive, expansionist foreign policy initiatives" and elaborated "a theory of national foreign relations powers" that

bypassed constitutional limitations and rested on “inherent” powers of national sovereignty. The “primary thrust” of his thinking “was to disassociate” foreign relations powers “from the essentialist structure” of domestic “enumerated and reserved [powers] constitutional jurisprudence.” Ultimately, as a justice in 1936, Sutherland wrote the Court’s opinion in *United States v. Curtis-Wright Export Co.* where, with “breathhtakingly broad scope and dubious use of authorities,” he wrote his earlier theories into law. Rejecting the principles of orthodoxy, Sutherland’s opinion conferred near absolute discretion on the president and ruled that “the ‘inherent’ foreign relations power of the federal government was extraconstitutional.”

White uses Sutherland’s work on foreign relations law effectively for several purposes. First, it shows that one of the legendary “Four Horsemen” was neither a stereotypical reactionary nor a rigid “mechanical” jurist. Second, it bolsters White’s “causal” argument by demonstrating that “some transformative doctrinal changes” were underway long before the New Deal. Third, it exemplifies how “orthodox” constitutional thinking began to change under pressure from “some dramatic and frightening features of modernity,” in this instance “the increasingly expansive and foreboding character of the emerging twentieth-century international order.” Finally, exemplifying the “awkward and painful accommodation of constitutional orthodoxy to modernity” that later generations failed to recognize, Sutherland’s career illustrates the bias and inadequacies of their “conventional account.”

As intellectual history White’s analysis is compelling, but it is problematic as a critique of “modernist theory” or a defense of the rule of law. After all, it shows that Sutherland rejected established law and literally wrote his own personal views into the Constitution. That surely supports a basic “modernist” idea and complicates any theory of legal determinacy. Further, Sutherland’s foreign relations jurisprudence demonstrates that he was not an “essentialist” in any absolute or “principled” way. Rather, he was an “essentialist” who was prepared to abandon “essentialism” as well as limited government when he saw a good reason to do so. Thus in his case, at least, “orthodoxy” and “essentialism” seem to represent something far more complex—and far more socially, politically, and individually

rooted—than an established and controlling legal “epistemology.” Finally, Sutherland’s behavior raises a basic question. Why did he abandon “essentialism” in foreign relations law but remain rigidly orthodox in domestic law? Clearly, a satisfactory explanation for the difference cannot rest on either the absence of modernist pressures on domestic constitutional law or Sutherland’s simple fidelity to orthodox doctrine and faith in the unalterable principles inherent in the Constitution.

Indeed, Sutherland’s abandonment of constitutional limitations and his embrace of “inherent” sovereign powers brings to mind the parallel behavior of another of the Court’s legendary “anti-progressives,” Justice David J. Brewer. Rejecting the idea of “inherent” power as a justification for executive and legislative action, Brewer readily embraced the idea to justify the judicial power used to crush the Pullman Strike of 1894. Like Sutherland, Brewer was also an exponent of an unchanging Constitution, jurisprudential essentialism, and judicially-enforced limitations on government. He was also—again like Sutherland—a willing instrumentalist *dans les grandes occasions*.

The careers of Sutherland and Brewer highlight the unavoidable, if variously constrained, role that individual and personal factors play in constitutional law. For his part, Brewer readily accepted that truth. A judge, he insisted, must be prepared to “assert his convictions of right and wrong.” Dissenting in *West Coast Hotel*, Sutherland acknowledged a similar understanding. “The check upon the judge,” he declared, “is that imposed by his oath of office, by the Constitution and by his own conscientious and informed convictions.”

The important conclusion is not that Brewer and Sutherland were bad people, or bad judges, or even unusual judges. Rather, it is that they were not only judges but judges on a most unusual court—a court shaped by a long and complex process of institutional evolution—that has come to address issues that often allow and sometimes compel both “instrumentalist” responses and recourse to personal “convictions.” Nor is the conclusion either that they were always and simply “instrumentalists” or that they faced no constraints from inherited legal doctrines and concepts. Rather, the point is that on various issues and on various occasions they had varying amounts of

discretion which they used in varying ways, depending in varying degrees on their own varying values and perceptions at different historical moments. Such a conclusion must surely be deeply unsatisfying for stereotypical "traditionalists" and "behavioralists" alike. That generality, nonetheless, is one of the lessons of the historian's judicial history.

That truth suggests one of the limits—and it is a limit, not a refutation—of White's "doctrinal disintegration" thesis. The mere fact that doctrinal evolution had opened new pathways neither required any of the justices to trod them nor specified when, to what extent, and for what purposes they were to be followed. At any point in time justices have a wide variety of premises, logics, shadings, and distinctions—legal and factual—available to shift in varying degrees the vectors of constitutional interpretation. Few cases reach the United States Supreme Court without plausible arguments on at least two, if not more, different sides. Thus, "doctrinal disintegration" could be but one of the factors that "caused" the "constitutional revolution."

Those thoughts suggest, finally, that White's focus on the evolution of formal doctrine leads him to overlook what might be a critical factor in the "constitutional revolution." Much of the entire controversy stemmed from the performance of one person, Justice Owen J. Roberts, the ultimate "swing" justice. Scholars have generally seen Roberts as wanting in self-confidence, lacking a well-considered constitutional jurisprudence, and susceptible to the influence of other justices and, perhaps, to outside pressures as well. Roberts himself acknowledged his own disappointment with his judicial performance. Had his seat been filled by another, the constitutional history of the 1930's would likely have been quite different, perhaps even without a "constitutional revolution" of any type.

While a "weak justice" thesis seems plausible, it also appears to be unacceptable to many. Foundational issues—the practice of constitutional government and the rule of law—are at stake, and it seems unsatisfying to explain something as spectacular as a "constitutional revolution" as the consequence of a single uncertain and vascillating individual. We reject such an interpretation, perhaps, for the same reason that many people reject the idea that a crazed individual,

acting entirely alone, could assassinate a president of the United States. It could, nonetheless, be true.

C.

White's book is also a broad-gauged assault on a certain kind of constitutional history that has gained prominence in the past two decades. In particular, White attacks the work of law professors Cass Sunstein and Bruce Ackerman for attempting to meet the challenge of Reagan "originalism" by manipulating historical materials to serve the purposes of contemporary modernist liberalism. In addition, to broaden his thesis, White also criticizes the work of historian Laura Kalman, who has been sympathetic toward Ackerman's work and, according to White, produced "another reconstructed version of the conventional account." Clinging to the view that judges are merely political actors, her work "suggests that the most fundamental challenge to the conventional account of American constitutional history may be one directed toward its modernist-inspired, behavioralist assumptions about constitutional law and judging."

With respect to Sunstein and Ackerman, White's comments seem fair if incomplete. Ackerman's work is overtly "theoretical," while Sunstein has acknowledged his search for "a useable past." Their politics, purposes, and strategies are hardly secret. What White leaves out in his effort to historicize their work, however, is a discussion of the "originalist" campaign—equally partisan and problematic—which prompted their efforts. If judges and scholars accept lawyered history, then Sunstein and Ackerman can be blamed for little more than playing the game. If they are to be historicized, the work that provoked them should be treated similarly.

In fairness, White may intend—though implicitly and indirectly—to do just that. In an intriguing chapter he traces the growing use of the term "substantive due process" from 1938 through the late 20th century, suggesting that the term served the conscious and unconscious purposes of commentators and distorted the nature of early 20th-century constitutional jurisprudence. Thus, his analysis suggests some of the uncertainties and dangers inherent in efforts to unearth any "original intent." One is that researchers who serve

contemporary purposes and seek forensic leverage transform the quest from the merely daunting to the intrinsically dubious. Another is that the denotations and connotations in our luxuriant vocabularies change, and the passing years pile layer upon layer of meaning onto the words and concepts we use. Without careful attention to the individual history of each, we cannot recapture the "lost attitude toward constitutional interpretation" that marked a prior age.

Thus, White seems to suggest that when researchers seek a directive "original intent" from a time further removed than the early 20th century, they are even more likely to produce mere confirmations of their contemporary views. There are, he insists, "striking perceptual differences" between the current generation and those who lived through the "constitutional revolution." By underscoring substantial "perceptual differences" between generations which lived a mere 65 years apart, he implies that contemporary commentators who seek a more distant "original intent" have embarked on a particularly hazardous and suspect enterprise. As he wisely warns against liberal efforts to schematize the New Deal for contemporary purposes, he seems to warn equally, if less overtly, against conservative efforts to find "answers" to current problems in any more distanced "original intent."

With respect to Kalman, White's comments stand on a somewhat different footing. Acknowledging her own political views, Kalman has struggled openly with complex historical materials. The fact that she stresses "the deeply behavioral character of judging"—especially in considering the events of the 1930's—hardly provides a basis for inferring that she rejects all claims that legal materials may play causal roles in shaping judicial decisions. Nor does it provide a basis for concluding that she equates such claims with a "revival of an older, unreflective caricature of judging as an apolitical process."

Ironically, White's discussion of Kalman's work highlights the unresolved issue that lies at the heart of *The Constitution and the New Deal*: the role of legal materials in shaping judicial decisions. The book stresses that a dominant modernist "behavioralism" has inculcated the belief that judicial decisions are nothing but ordinary political actions and that modernism has consequently created a "large hole" in the middle of "the conventional account." That hole,

White insists, “can only be filled by close analysis of the world of early twentieth-century constitutional doctrines, categories, and analogies.” A fair enough hypothesis. Behavioralists apparently exist, and the “constitutional revolution” seems for them an ideal nesting spot. But the real historical question about the causal role of legal doctrines and concepts is not a general one. Few knowledgeable scholars would suggest that legal concepts and doctrines never have causal significance, and fewer still would claim that they always have such force. Insofar as the question can ever be answered clearly and convincingly, it can only be answered for specific times, places, issues, courts, and judges.

As a sophisticated lawyer and historian, White seems to acknowledge that conclusion. His goal, he tells us, is only to complicate history by insisting that legal doctrines and concepts have *some* causal significance. Indeed, he notes that “traditional” judicial decisionmaking in the early 20th century was “not fully consistent” with essentialism and that “guardian review” itself was “seemingly designed to give judges a fair amount of latitude.” Moreover, he readily admits that “changes in constitutional law doctrines have been habitual in the history of the Court.” In fact, White offers that last proposition as a reason for testing the “causal” impact of the Court-packing plan solely by events in the first half of 1937. “If the time frame is broadened,” he explains, “adherents of the Court-packing thesis are able to contrast a fairly large sample of pre-1937 decisions with several post-1937 decisions, illustrating changes in constitutional doctrine.” But establishing substantial change in a broadened time frame would not prove any special “revolution” because “that sort of exercise can be undertaken, if a sufficient time interval is employed, for any period in the Court’s history.”

Ultimately, then, the broader argument of *The Constitution and the New Deal* is ironic. There was no New Deal “constitutional revolution” because constitutional law was, and continues to be, a constantly evolving phenomenon.

More striking, the book never actually shows that legal doctrines and concepts did, in fact, “cause” any judicial decision. Indeed, insofar as it identifies “doctrinal disintegration” as a causal factor in the “constitutional revolution,” its argument would seem to imply a

dominant causal role for other, unspecified non-doctrinal factors. After all, if doctrine was disintegrating, how could it have the power to "cause" constitutional changes? Did disintegration not mean, rather, that doctrine necessarily declined in significance and thereby allowed wider play to substantive values and assumptions different from those that were embedded in the crumbling orthodoxy?

V

Such questions are the inevitable fruit of a book as ambitious and provocative as *The Constitution and the New Deal*. We are in White's debt for challenging us to rethink some of the broadest and most fundamental issues in American constitutional law and history.